confidentiality provisions of many programming agreements, force cable operators to disclose extremely sensitive price information and wreak havoc in the programming marketplace.[97]

59. Programmers note that operators have not been responsive to their requests for information about leasing capacity. United Broadcasting Corporation ("UBC") states that it has been unable to obtain documents and calculations substantiating proposed rates from TCI.[98] Videomaker states that a lack of information about implicit fee rates makes it "virtually impossible" to make a clear and convincing case against an operator.[99] CME states that, in addition to supporting a claim that a quoted rate is higher than the highest implicit fee, access to the data upon which the cable operator based its rate would enable a programmer to decide whether to file a complaint.[100]

3. *Discussion*

60. We decline to adopt on reconsideration CME's suggestion that we require cable operators to make the contracts underlying their leased access rates public. We believe that this could be unnecessarily intrusive on business relationships between operators and non-leased access programmers. However, we note that upon request from the Commission in the context of a leased access complaint, operators are required to justify fully their leased access rates, including by presentation of underlying contracts if necessary, subject to the operators' right under our rules to request confidentiality of this information.[101]

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Maximum Rate Formula

1. *The Cost Formula*

61. Given the limitations of the highest implicit fee described above in the *Order*, the Commission has developed an alternative proposal that it believes may better promote the

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[97] CVI Opposition at 21.

[98] UBC Informal Comments at 9.

[99] Videomaker Opposition at 7.

[100] CME Reply at 7.

[101] *See* 47 C.F.R. § 0.459. We also note that in the *Rate Order*, we provided that franchising authorities may request proprietary information such as programming costs and other types of financial information, provided that they follow procedures analogous to 47 C.F.R. § 0.459 to ensure the confidentiality of operators' proprietary information. *Rate Order*, 8 FCC Rcd at 5717-5718, ¶¶ 129-130.

goals of leased access. We generally agree with Time Warner that the value of leased access channels "is the opportunity cost imposed on the operator from the lost chance to program these channels."[102] We also agree with CBA when it asserts that cost should be the fundamental basis for establishing maximum leased access rates.[103] In addition, we agree with UBC that the maximum rate could become a market rate when the statutory set-aside requirement is met.[104] We tentatively conclude that we should base our maximum rate formula, which we call the cost/market rate formula, on these principles.

62. We do not agree, however, with ValueVision's argument that home shopping commissions, or what it calls the "explicit fee," should be the maximum rate for home shopping leased access channels.[105] While we agree that home shopping commissions should be excluded from the implicit fee calculation, as discussed below, we do not accept ValueVision's "explicit fee" proposal. We do not believe that home shopping programmers should be treated differently from other programmers. We therefore reject ValueVision's proposal.

63. Our proposed cost/market rate formula, which is described below, would allow the operator to continue to recover its operating costs to the same extent it would without leasing, and to recover additional reasonable costs, including a reasonable profit, associated with leased access. We believe that the rate that would result from this proposed approach would provide both operators and programmers with sound economic incentives to use leased access. A cost-based formula is not an attempt to influence demand or supply in any particular way. To the contrary, it is an economically sound mechanism for determining the appropriate level of leased access demand.

64. Because our proposed cost/market rate formula is a significant departure from the highest implicit fee formula, and to avoid any unintended consequences, we are not adopting the cost/market rate formula at this time and are instead seeking comment on our proposal. In particular, we seek comment to develop a record on particular implementation concerns and solutions. However, given our concerns about the highest implicit fee formula, we expect to act on the comments received in response to this *Further Notice* as expeditiously as possible.

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[102] Time Warner Petition at 14.

[103] CBA Petition at 3.

[104] Ex Parte Letter to William F. Caton, Federal Communications Commission, from Matthew C. Ames, counsel for United Broadcasting Corporation (March 8, 1995), at attached written presentation at 13-14.

[105] *See* ValueVision Petition at 3. *But see* CME Opposition at 7 (opposing ValueVision's request on the ground that it would lower home shopping rates and consequently home shopping would displace other leased access programmers).

a. *Economic Justification*

65. We tentatively conclude that the maximum rate for leased access should depend on whether a cable operator is leasing its full statutory set-aside requirement. We believe that the goal of the maximum rate should be to promote the use of the leased access set-aside channels without imposing an undue financial burden on the operator.[106] We therefore tentatively conclude that our approach to setting a maximum rate should (a) encourage the use of the set-aside channels without giving programmers a subsidy, and (b) allocate the channels to the leased access programmers that value the channels most (i.e., are willing to pay the most) when the demand for leased access channels exceeds the statutory set-aside requirement. We request comment on these tentative conclusions.

66. We also tentatively conclude that, when the set-aside capacity is not leased to unaffiliated programmers (or minority or educational programmers pursuant to Section 612(i) of the Communications Act[107]), the maximum rate should be based on the operator's reasonable costs (i.e., the costs of operating the cable system plus the additional costs related to leased access), including a reasonable profit. We request comment on this tentative conclusion. We believe that leased access can be promoted without providing a subsidy to programmers by establishing a pricing scheme that is based on costs. Programmers who cannot afford the rate will not and should not gain access because they would impose a financial burden on operators.[108] We ask for comment on this conclusion.

67. Under the proposed cost formula, we believe that the operator would be compensated for reasonable costs associated with the leased access channels. In this context, the cost formula is not intended to guarantee that all operating costs will be fully recovered. The intent of the cost formula is to permit the operator to continue to recover the same proportion of operating costs from subscriber revenues as were recovered before the channel was used for leased access. Thus, under the proposed cost formula, the operator would not be adversely affected in terms of its ability to pay operating costs.

68. We believe that the proposed cost/market rate formula represents a pricing scheme that would promote leased access without giving programmers a subsidy. The purpose of the cost formula is not to lower rates. It does not guarantee that leased access programming will increase or that the maximum rate for leased access programmers will decrease.

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[106] *See* Communications Act, § 612(c)(1), 47 U.S.C. § 532(c)(1) (stating that operators shall establish price, terms and conditions for leased access which are at least sufficient to assure that leased access use will not adversely affect the operation, financial condition, or market development of the cable system).

[107] Communications Act, § 612(i), 47 C.F.R. § 532(i); *see also* Section IV.G. below.

[108] *Id.*

69. The portion of the maximum rate for leased access channels included in a tier of programming which we propose be paid by the leased access programmer (the "programmer charge") would be based on the reasonable costs (including reasonable profits) that leased access imposes on the operator. These costs are specific to the channels designated for leased access. Some of these costs are associated with removing or "bumping" non-leased access programming to accommodate leased access programming; others are the direct costs associated with the specific leased access programmer or its programming. To simplify this discussion, we will refer to all of these costs as opportunity costs. As will be discussed below, our proposed cost formula would not allow the operator to recover all opportunity costs. Instead, the operator would be allowed to recover only those types of opportunity costs which can reasonably be attributed to carriage of the leased access programming and which are reasonably quantifiable.

70. On the other hand, we tentatively conclude that if the operator satisfies its set-aside requirement, the maximum rate should be a market rate determined by negotiation between the operator and the leased access programmer.[109] We believe that market rates will most effectively determine which programmers should receive leased access on the system when the operator's set-aside is satisfied. Within the leased access market, those programmers who are able to pay the most for channel capacity would presumably be able to acquire the set-aside channels. The higher price which some leased access programmers may offer to pay for the channel capacity reflects the greater ability and willingness of consumers to pay for the programming to be carried on each of these channels. Thus, relying on market prices to allocate channel capacity provides consumers with an efficient mechanism to communicate their preferences about which leased access programming should be carried by the operator.

71. We recognize that the market rate may rise above the operator's costs; such prices, however, are the result of competition among unaffiliated programmers to use the statutory leased access channel capacity. We believe that, so long as the operator is accommodating leased access to the full extent required by Congress and Section 612, any price increase would be reasonable. After all, under our proposal, the operator cannot charge market rates if the number of channels leased falls below the number designated by the statute. Thus, a higher rate would reflect excess demand by programmers for the operator's statutory channel capacity.

72. In general, market power refers to the ability of a seller to restrict output below the desirable level and to set a price above costs (i.e., to set an unreasonable rate). In the leased access context, Congress has defined the appropriate level of output by establishing the set-aside requirement, and the operator cannot restrict the output below this level. Therefore, even if the market rate rises above the operator's costs, we do not believe that the operator is charging unreasonable rates since Congress has determined the appropriate level of output. We seek comment on these tentative conclusions.

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[109] See Section IV.A.2. for how the market rate would be implemented.

73. We ask for comment on whether it is appropriate to allow the maximum leased access rate to be negotiated when the operator has fulfilled its set-aside requirement, as well as our rationale for doing so. We seek comment on the extent to which negotiated rates are adequate to address Congress' mandate that we set a maximum reasonable rate and the extent to which negotiated rates could be used to exercise editorial control over the leased access channels, contrary to Congress' intent. We also ask for comment on how operators may choose between competing programmers. For instance, we ask if operators should be required to select the highest bidder. We also seek comment on any alternatives for setting maximum rates when an operator is leasing its full set-aside capacity.

74. We do not propose to maintain the programmer categories established under the highest implicit fee formula under the proposed cost formula. Although operators are permitted to consider content of programming in determining the price,[110] we believe that the Commission should not establish a separate maximum rate under the cost formula based on the content of the leased access programming. Our proposed cost formula is based purely on the operator's costs associated with its system and leased access programming. ValueVision's claim that home shopping programmers should be treated differently simply because of the "fundamentally different economics of the home shopping market" is unpersuasive. Under the proposed cost formula, we are not basing the maximum rate on the economics which the leased access programmer faces. We therefore do not believe that treating different programmers differently is appropriate under the cost formula. Similarly, we do not believe that there is a need to establish categories for advertiser-supported and non-advertiser supported programmers, as CME and Paradise propose. Accordingly, we tentatively conclude that we will not establish programmer categories for implementation of the cost formula. We request comment on this tentative conclusion.

b. Designating Channels

75. We propose that the cost formula determine a maximum leased access rate based on the cost of the channels designated to be used for leased access by an operator. The opportunity costs would be derived from the programming that is actually bumped from the operator's programming line-up. If, for example, an operator plans to place leased access programming on channel 28, and move the programming currently carried on channel 28 to channel 32, the cost formula calculations should be based on the opportunity cost of the programming currently carried on channel 32.

76. To derive the channel cost under the proposed cost formula,[111] an operator would first select the specific channels it would use for leased access programming, as

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[110] Communications Act, § 612(c)(2), 47 U.S.C. § 532(c)(2).

[111] A step-by-step guide through the maximum rate calculation based on the proposed cost formula is attached as Appendix B.

demand arises, in order to meet its set-aside requirement. We propose that the operator would be required to place these channel designations, including the channel numbers and the programming carried on each channel at the time the operator calculates the maximum rate under the cost formula, in its public file. We request comment on this proposal. Operators would be permitted to revise their selections annually to permit them to revisit the decisions in light of any change in circumstances.[112] The operator would be required to designate enough channels to satisfy its full set-aside requirement.[113] Basing the rate on the actual designated channels would be attractive from an economic perspective because the compensation to the operator would be based on its actual costs of leasing the designated channels. We request comment on this proposal generally. We also request comment on how we might restrict an operator's ability to manipulate its designation of channels so as to derive a prohibitively high rate in an effort to impede leased access. For example, we ask whether there should be a presumption against an operator designating only its highest valued channels in such a way as to inflate its maximum leased access rate. We also ask whether operators should be permitted to base their maximum rate calculation on affiliated programming, if the operator designates channels that carry such affiliated programming.

c. *Operating Costs*

77. The first component of the proposed cost formula is the operating costs.[114] We tentatively define operating costs to include fixed and variable costs that the cable operator incurs regardless of what programming is carried over the channel. Commission data shows that, in the tier context, this component, including a reasonable rate of return, is substantially covered by the revenue the operator receives from subscribers.[115] Using subscriber revenue as a proxy for the operating costs for tiered channels allows the operator to recover its operating costs to the same extent as it did with non-leased access programming on the channel. We therefore tentatively conclude that it is appropriate for purposes of the proposed cost formula to designate subscriber revenue as the operator's payment toward its operating costs. Thus, the operator would not need to calculate its operating costs for channels that are currently on programming tiers (or dark), and would instead use the amount representing the average

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[112] *See* Section IV.A.4.

[113] See Communications Act, § 612(b)(1), 47 U.S.C. § 532(b)(1), for set-aside requirements.

[114] See Appendix C for a diagram of the components of the cost formula/market-based rates approach.

[115] Based on cost-of-service rate regulation filings previously made with the Commission (FCC Form 1220), cable systems' operating costs are estimated to average about $0.46 per channel per subscriber per month. The corresponding average revenue from subscribers is estimated to be approximately $0.53. Since these cost-of-service filings are for high cost systems, we would expect our findings to also apply to lower cost systems.

subscriber revenue per channel as its operating costs per channel in calculating the cost formula.

78. Similarly, we propose that operators would not need to calculate their operating costs for channels that are currently carried as premium services or on unregulated programming tiers. As with channels carried on regulated programming tiers, we believe that using the subscriber revenue for an unregulated channel as its payment toward its operating costs will allow the operator to recover its operating costs to the same extent as it does with the non-leased access programming carried on the channel. We recognize that unregulated subscriber revenue might recover more than the operator's operating costs; however, we believe that any profit which is generated from subscriber revenue could be viewed as an opportunity cost imposed on the operator who forgoes these profits when this channel is used to carry leased access programming. For simplicity, we propose not to require the operator to deduct this lost profit from the operating cost portion of the formula simply to add it back to the opportunity cost portion. We seek comment on these tentative conclusions.

d. *Net Opportunity Costs*

79. We propose that the second component of the cost formula, "net opportunity costs," would include the reasonable costs (or cost savings) that the operator incurs by leasing the channel to the leased access programmer that it would not have incurred had it continued with the current use of the channel. In other words, the net opportunity cost portion of the cost formula would include reasonably quantifiable costs (or savings) associated with carrying the leased access programming instead of other programming. We recognize that our proposed formula does not incorporate all opportunity costs. As discussed below, some costs are not easily quantified; others the Commission does not believe are appropriate to include in the leased access fee. In order to provide some uniformity in the calculation of opportunity costs, we propose to identify categories of quantifiable costs which operators may include in calculating the cost formula.

80. The first category of opportunity costs that the Commission proposes to allow recovery for is lost advertising revenues. This type of lost revenue would be a quantifiable opportunity cost when the operator is forced to bump a non-leased access programmer to accommodate the leased access programmer, or when the operator is forced to forego placing new programming on a dark channel. For example, if a channel designated for leased access is currently being used for non-leased access programming which is generating advertising revenues, the operator might be entitled to recover from the leased access programmer an amount equal to the current programming's advertising revenues.

81. We do not propose to reduce the opportunity cost for lost advertising revenue by the value of any advertising time the operator may receive from the leased access programmer. We believe that the leased access programmer is entitled to pay no more than the maximum rate, regardless of whether the operator receives advertising time. If the leased access programmer does not want to give the operator advertising time, we tentatively

conclude that the programmer is not required to do so. On the other hand, if the programmer wishes to bargain for a lower rate in exchange for advertising time, we believe such bargaining is fully permitted by our rules and is a matter to be negotiated between the parties.

82. The Commission proposes that the second opportunity cost category should be lost commissions. If, for example, to accommodate a leased access channel, an operator were to bump a direct sales programmer from which the operator receives a percentage of the programmer's revenues, those commissions constitute a quantifiable opportunity cost which we propose be factored into the cost formula.

83. On the other hand, we also believe that any program license fee that the operator does not have to pay because the non-leased access programming is not being carried is a cost savings. We believe that such a cost savings should be factored into the calculation of the operator's net opportunity cost.[116] For instance, if an operator designates a channel for leased access on which the operator currently carries a non-leased access programmer to which the operator pays $.02 per subscriber in license fees, that $.02 multiplied by the number of subscribers receiving that programming must be subtracted from the operator's opportunity costs for that channel. We tentatively conclude that cable operators should be required to deduct any license or programming fees that the operator does not have to pay due to the carriage of the leased access programming. Since license fees are likely to be substantial on premium channels, this opportunity cost is especially important for premium channels designated for leased access. One possible concern is the extent to which either the operator or the programmer can influence the license fees paid for non-leased access programming. We ask how, if at all, the operator or programmer can influence the programming license fee and how that influence might affect the Commission's measurement of programming cost savings under the proposed cost formula.

84. Another cost category which the Commission believes may be appropriate relates to technical costs (e.g., the cost of scrambling) incurred by the operator in offering leased access programming. If, for example, a programmer asks to lease channel capacity for a premium service, an operator may incur additional costs of limiting that programming to subscribers of the leased access service. An operator may also incur additional costs associated with scrambling if, for instance, the leased access programming is indecent and, under Section 505 of Telecommunications Act of 1996,[117] the operator is required to fully

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[116] Because some opportunity costs are positive and at least one is negative, we use the term "net opportunity costs" to denote the positive opportunity costs minus the negative opportunity costs.

[117] Communications Act, § 641(a), 47 U.S.C. § 561(a). We note that the Commission has been temporarily restrained from enforcing this statutory provision by the U.S. District Court for the District of Delaware. *Playboy Entertainment Group, Inc. v. United States*, No. CIV.A.96-94/96-107-JFF, 1996 WL 115314 (D.Del. March 7, 1996).

scramble or fully block the leased access programming for those not subscribing to it. Thus, under our proposed cost formula, those costs could be included in calculating the maximum rate. We propose to distinguish these technical costs from those for technical support for which the operator is permitted to charge separately under Section 76.971(c).[118] We request comment on these proposals.

85. Another potential opportunity cost category could be any reduction in the tier charge that the operator charges the subscriber when the reduction is caused by substituting the leased access programming for non-leased access programming. Under the Commission's going forward methodology, substituting the leased access programming for a non-leased access programmer on the same tier would not affect the subscriber rate.[119] If the operator adds a channel to the BST to accommodate leased access, the operator is permitted to add a per-channel residual to the charge for the tier.[120] If the operator elects the going forward option and adds a channel to a cable programming services tier, the operator would recover the same \$.20 from subscribers that it would recover if it placed a new non-leased access channel on the tier.[121] Under any of these circumstances, no lost subscriber revenue would be included in the calculation. However, we seek comment on how an operator might be able to demonstrate that its subscriber revenue is quantifiably reduced on a specific designated channel because of the leased access programming carried on that same channel, and, if this is possible, whether the operator should be permitted to include this loss in the cost formula.

86. We tentatively conclude that the cost formula should not explicitly include revenue lost because of a purported loss in subscribership to a particular tier because particular programming is dropped. We tentatively conclude that, in the tier context, any such subscriber loss is too speculative to measure accurately. In the premium context, however, we believe that this subscriber loss is included by allowing the operator to include an amount in the proposed cost formula equal to the total subscriber revenue for the bumped channel. In addition, operators would be able to consider any potential loss of subscribership in deciding which channels to designate for leased access. Nonetheless, we request comment on how our cost formula might measure changes in subscriber penetration due to the addition of leased

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[118] 47 C.F.R. § 76.971(c). Section 76.971(c) provides that cable operators are required to provide leased access programmers a minimal level of technical support necessary to present their material on the air, and that leased access programmers must reimburse the operators for the reasonable cost of any technical support actually provided.

[119] 47 C.F.R. § 76.922(g)(6).

[120] 47 C.F.R. § 76.922(g).

[121] The \$.20 charge that the operator can recover for adding a channel under the going forward option is not inconsistent with the \$.46 average operating cost estimate cited earlier. The former relates to the incremental cost of adding a new channel whereas the later refers to the average cost of a channel already on the system.

access programming. Specifically, we seek comment on how such subscriber revenues could be calculated and on how the operator could demonstrate that lost subscriber revenues are attributable to a leased access programmer.

87. We also recognize that there may be opportunity costs associated with using a channel for leased access which does not currently carry programming, i.e., a dark channel. We believe that the presence of dark channels on a system does not necessarily indicate a lack of available programming. As an example, an operator might reserve a dark channel in anticipation of more desirable programming becoming available in the future. Since operators forego the opportunity to carry their own programming any time leased access programming is placed on a dark channel, we propose to allow operators to approximate the opportunity costs of dark channels by assigning these dark channels the per channel opportunity cost of the programmed channels on the system with opportunity costs that have the lowest positive values, not including programmed channels that the operators are required to carry such as must-carry, PEG, or any leased access channels already being carried, in order to satisfy the set-aside requirement. If the cost formula were based on designated leased access channels, the number of designated dark channels would determine how many programmed channels should be used. Specifically, under this proposal, if one designated channel is dark, it would be assigned the opportunity cost of the programmed channel on the system which has the opportunity cost with the lowest positive value. If an operator designates two dark channels for leased access, it would assign the opportunity cost of the two programmed channels on the system which have the lowest opportunity cost with a positive value, and so on. We seek comment on this proposal.

88. As stated above, we believe that it is necessary to use only channels with positive opportunity costs as proxies for dark channels. We believe that this is necessary because we do not believe that operators generally carry programming that has a negative economic benefit to them, which is what a negative opportunity cost value would indicate. We suspect that, if a channel has a negative net opportunity cost, it may be because the cost formula does not include an approximation of the value of subscriber penetration. Although we do not believe we can accurately measure loss in subscriber penetration that may be caused by substituting leased access programming for non-leased access programming for purposes of the cost formula, we tentatively conclude that using only those channels with a positive opportunity cost as proxies for dark channels will compensate for this limitation. As also stated above, however, we request comment on how we might measure changes in subscriber penetration due to the addition of leased access programming. We ask how we might identify which channels should not be deemed to have the lowest opportunity cost for purposes of approximating the opportunity costs of dark channels.

89. We believe that this method would yield the most reasonable approximation of opportunity costs for dark channels. We believe that, unless the operator has a programming contract in place, permitting the operator to estimate the opportunity costs of new programming that it may at some future time carry on a currently dark channel would allow for too much speculation. In addition, we believe that, when the new programming that the

operator would have placed on the dark channel is available, the operator acting rationally would place the new programming on a channel with lower opportunity costs if the operator expects the new programming to be more profitable than the programming that is replaced.[122] We therefore tentatively conclude that the opportunity costs of dark channels are most reasonably approximated by measuring the opportunity costs of the channels that are most likely to be bumped in order to accommodate new programming. We believe that the channels with the lowest opportunity costs are the most likely to be bumped but, as we explained above, we would not require the use of channels with a zero or negative opportunity cost value. We ask commenters to address the validity of these assumptions.

e. Averaging the Per Channel Costs for All Designated Channels

90. Because the operator may select designated channels from the BST, any CPST, or premium services, we believe that the corresponding per channel costs will vary depending on the number of subscribers that receive each service. Consequently, we propose that all costs must be computed on a per channel basis rather than on a per subscriber basis. As discussed below, the per channel costs for each designated channel could then be used to determine the average channel costs of a designated channel.

91. We tentatively conclude that applying an average channel cost to leased access will promote fairness because all leased access programmers will therefore be subject to the same maximum rate. We note that an operator's designation of leased access channels is made independently of the leased access programmer's request for access. We do not believe that the operator should be required to bump the same type of service (i.e., a channel on the BST, a CPST, or a premium channel) that is requested by the leased access programmer. In other words, assuming there are no technical constraints, operators should not be required to bump a tiered channel when the leased access programmer asks to be carried on a tier. With this in mind, we also believe that averaging the channel costs would mitigate against the operator's ability to manipulate the cost formula by designating one high cost channel and requiring a particular leased access programmer that the operator wants to keep off its system to pay the opportunity costs for that particular programming.

92. Therefore, we propose that, after the operator has calculated the per channel opportunity costs and added the corresponding subscriber revenue (as a proxy for operating costs) to obtain a total per channel cost, the operator should average these per channel costs

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[122] New programming may be placed even on designated channels not currently being used for leased access, but the operator would not be permitted to raise the maximum rate by factoring in the higher opportunity costs of the new programming. On the annual redesignation date, the operator would have the opportunity to determine a new maximum rate based on whatever channels it then decides to designate.

by adding them all together and dividing by the number of designated channels.[123] The result would be the Commission's proposed cost-based maximum rate for a leased access channel if the operator has not fulfilled its leased access set-aside requirement. We seek comment on whether averaging the per channel costs is appropriate under the proposed cost formula.

f. Calculating the Leased Access Programmer Charge

93. Under our proposed cost formula, once the operator determines the maximum rate as set forth above, the operator would determine how much of that maximum rate it could charge the leased access programmer. If the leased access programming is to be carried on a programming tier, the proposed cost formula would allow the operator to collect and retain revenue for that channel from the subscribers to the tier as payment for its operating costs. However, to avoid a double recovery by the operator like that discussed above in Section III.A.3.b., the operator would not be permitted to include these operating costs in computing the portion of the maximum rate that the operator may charge the leased access programmer. The operator would therefore be required to subtract the total subscriber revenue for the channel from the maximum rate. The difference would be the programmer charge, i.e., the maximum amount that the operator would be permitted to charge the leased access programmer directly. We request comment on this proposal.

94. We tentatively conclude that if a leased access channel is to be carried as a premium service, the full maximum rate derived from the cost formula could be charged to the leased access programmer, to the extent that all of the monthly subscriber revenue for the leased access channel flows to the leased access programmer. We believe that this is appropriate because we cannot assume that the leased access premium service will attract the same subscribership as the non-leased access programming. Thus, the operator would be allowed to charge the full maximum rate which recovers its costs. In return, the programmer would receive all the subscriber revenues from its premium service. We request comment on these tentative conclusions.

g. Adjustment for Part-time Administrative Costs

95. Regardless of whether the leased access programming is carried on a tier or as a premium service, we recognize that there may be additional costs associated with part-time leases.[124] We therefore tentatively conclude that operators should be permitted to charge a part-time leased access programmer the actual incurred costs of negotiating and administering the programmer's part-time contract which exceed what normally would be spent in

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[123] See the numerical illustration in Appendix D.

[124] As discussed in Section III.B., some cable operators in this proceeding complain that proration of the current highest implicit fee does not allow them to recover the cost of administering part-time leases. *See, e.g.*, Bend Opposition at 7; Booth Petition at 47-48.

negotiating and administering a full-time leased access programming contract. We do not believe that it is more expensive for an operator to negotiate and administer a full-time leased access programming contract than it is for them to negotiate and administer a full-time non-leased access programming contract. We therefore propose not to allow operators to charge full-time leased access programmers for administrative costs. Under our proposal, the additional costs associated with part-time leasing would be added to the programmer charge derived in accordance with the procedures described above for determining rates for leased access programming carried on a tier or as a premium service. We ask for comment on these tentative conclusions.

2. *Market Rate as the Maximum Rate*

96. As discussed above, we believe that, once an operator fulfills its set-aside requirement, the maximum cost-based rate would be replaced by a market based rate and not capped by the proposed cost formula. Under this proposal, the operator would be allowed to charge whatever rate it could negotiate with the leased access programmers, as long as the operator continues to meet its statutory set-aside requirement. Whether the operator retains the subscriber revenue would be a matter negotiated between the parties. Leased access programmers would then be forced to compete against each other for limited channel space, much the same as non-leased access programmers do. We tentatively conclude that the pressure on the operator to meet its set-aside requirement and the competition between the programmers seeking leased access will determine an appropriate market rate.

97. We propose that operators would be permitted to renegotiate the rate charged leased access programmers upon renewal of each programmer's contract, as long as the operator continues to fulfill its set-aside requirement. Thus, if the set-aside requirement has been filled, a current leased access programmer who gained access at the cost formula rate would have an opportunity at the end of its contract to bid against rival leased access programmers to obtain the right to continue to be carried on the system. If the amount of leased access programming being carried drops below the set-aside requirement, the operator would be required to return to the cost formula to determine the maximum rate on new programming contracts, as well as on contracts that are renewed at any time while the set-aside requirement is not met. Market rates contained in unexpired contracts would not need to be renegotiated. We seek comment on this proposal generally, and ask whether this proposal complies with our statutory mandate to establish maximum reasonable rates. We also seek comment on whether operators could exercise editorial control over leased access programmers contrary to Congress' intent, if rates for leased access were market based. In addition, we request comment on alternatives for setting maximum reasonable rates when an operator has satisfied its set-aside requirement.

3. *Transition Period*

98. We tentatively conclude that, on the effective date of the maximum rate-setting rules which we will adopt in response to this *Further Notice*, operators should be required to

implement the adopted formula, whatever that may be, for (a) programmers that are currently leasing channel capacity from an operator and (b) programmers demanding leased access on a system that has unused (or dark) channel capacity. We request comment on this tentative conclusion.

99. We believe, however, that transition relief may be appropriate in the case of new leased access requests with respect to systems that do not have any dark channels, where operators would be forced to bump existing programming in order to accommodate a leased access request. We recognize that, when an operator places non-leased access programming on a channel designated for leased access, the operator and programmer generally assume the risk that the programming may have to be bumped for a leased access programmer. The risk of having to bump, however, may increase with the introduction of the cost formula, or whatever formula we adopt, depending on the extent to which rates using the adopted formula affect the utilization of leased access. A transition to the new formula might (a) avoid unduly penalizing operators and programmers for decisions to use designated channels for non-leased access programming that were reasonably based on circumstances created by the Commission's previous rules, and (b) mitigate against the sudden disruption to subscribers' programming line-ups. We therefore request comment on whether the Commission should phase in the proposed cost formula, or any other rate setting formula which the Commission may adopt, for those leased access requests that can only be accommodated by bumping existing non-leased access programming. We also ask whether such transition relief should be applied to dark channels for which the operator has programming contracts in place. We ask for comment on how a transition might be accomplished and the specific mechanism the Commission should employ. In this context, commenters should explain how any proposed transition period would be consistent with the Commission's obligation to establish maximum reasonable rates for leased access. One possible approach would be the transition procedure set forth in Appendix E hereto. We seek comment on this approach and on any alternative approaches.

4. Adjusting Leased Access Rates under the Cost Formula Over Time

100. As described above, the proposed cost formula would require operators to designate the specific channels they will use to satisfy their set-aside requirement. We propose that an operator's selections are binding and the designated channels must be the ones that are in fact used to accommodate leased access requests. We do not believe, however, that operators should be required to adhere to their initial designations indefinitely, since the popularity and profitability of a designated channel could unexpectedly increase and the operator might no longer want to use it for leased access. In order to account for change, including changes in the profitability of channels, we tentatively conclude that operators should be allowed to redesignate their unused leased access channel capacity on an annual basis. For example, if an operator originally had to designate five channels, and one year after the cost formula were to become effective, only three were being used for leased access programming, the operator could change its remaining two channel designations and select two different channels to use for leased access. We request comment on these tentative

conclusions, and ask how an operator's maximum leased access rates should be adjusted over time. Our presumption in allowing operators this flexibility is that operators generally will want to use their least profitable channels for leased access, and so will redesignate a channel that is less profitable than the one that is being replaced. If an operator redesignates a channel that is significantly more profitable than the previously selected channel, and the redesignation would raise the operator's maximum rate, we tentatively conclude that the redesignation would be evidence of an attempt to inflate the maximum rate in contravention of the purposes of our rules and the statute.

101. In addition to permitting redesignation of leased access channels, we tentatively conclude that operators should be permitted to recalculate their maximum rates annually, in order to account for changes in the allowable opportunity costs of designated channels that currently are not being used for leased access. We request comment on whether this annual recalculation is appropriate, and on whether it should occur on the anniversary of the effective date of our modified rules, each calendar year, or on some anniversary which is most appropriate for an individual operator (to coincide with its annual audits, for example). We believe that allowing an operator to update its rates will better approximate the operator's changing costs of satisfying its leased access requirement. We request comment on whether our maximum rate should be cumulative over the life of the leased access contract so that an operator and a leased access programmer have the option, if mutually agreed upon, to establish a rate below the maximum rate during the first part of the contract term and a rate above the maximum rate during a subsequent part of the contract term. We also seek comment on whether such an option would provide operators with the opportunity to evade the maximum rate.

B. Part-Time Rates

102. As stated above in Section III.B., we conclude that proration of the maximum rate with time of day pricing is an appropriate method for establishing part-time rates under the highest implicit fee formula, at least for this interim time period. We request comment, however, on whether such proration is appropriate under our proposed cost formula, and, more specifically, if it is, whether the restriction that the part-time rates for a 24 hour time period total no more than the maximum rate is appropriate under the proposed cost formula. We seek comment on whether, if the cost/market rate formula were to be adopted for full-time leased access use, an entirely different method of calculating the maximum reasonable rate for part-time use would be more appropriate. If so, we request comment on how to define part-time leased access use, e.g., leases for less than a 24 hour channel, for 12 hours, for eight hours, or fewer.

C. Preferential Access

1. Background

103. In the *Rate Order,* we declined to establish a special rate category for not-for-profit programmers, and we also declined to require cable operators to set aside separate leased access channel capacity for not-for-profit programmers.[125] Since we expected our rules to result in rates adequate to attract potential not-for-profit programmers, we stated that the procedure we were adopting for determining the maximum leased access rates would reduce the need to specify any preferential rates for not-for-profit organizations. In addition, we noted that Section 611 of the Communications Act, regarding PEG access, adequately provided for not-for-profit programming, thus precluding the need for any set-aside for such programming.[126]

2. Petitions

104. CME urges the Commission to reconsider its decision not to establish lower maximum rates for not-for-profit channel lessees.[127] CME claims that the rates required by the Commission's rules result in unreasonably high rates for even major national not-for-profit organizations.[128] CME requests that the Commission therefore establish reduced rates for not-for-profit programmers. In its pleadings, CME requests that we set the not-for-profit rate at a nominal charge, such as one tenth of a cent ($.001) per subscriber or three percent of the programmer's revenue derived from carriage, whichever is greater.[129] For a hypothetical system with 50,000 subscribers, a one tenth of a cent per subscriber charge would result in a rate of $50 per month for a full-time channel. CME subsequently suggested that not-for-profits be charged the "incremental cost" of adding a not-for-profit channel to the cable

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[125] *Rate Order*, 8 FCC Rcd at 5954, ¶ 526.

[126] *Id.*

[127] CME Petition at 11.

[128] *Id.* at 11-12. CME cites the National Audubon Society as an example of a major national not-for-profit organization. CME states that, under the Commission's current leased access rate formula, the National Audubon Society would not be able to afford commercial leased access that would reach all cable households nationwide. CME estimates that it would cost over $400 million per year to lease a channel on a national basis, an amount which is almost seven times what the National Audubon Society's total operating budget was for 1992.

[129] Ex Parte Memorandum from John Schwartz and Jeff Chester, Center for Media Education, to Bruce Romano, et al., Federal Communications Commission (February 4, 1994); CME January 27, 1993 Comments in MM Docket 92-266 at 17-18.

system, which it determines to be $783 annually (or $65.25 a month) per system, regardless of the system's channel capacity, technical make-up, or number of subscribers.[130]

105. CME also urges the Commission to reconsider its decision not to establish a set-aside for not-for-profit programming. CME argues that the Commission erroneously concluded that Section 611 of the Communications Act provides adequate access for not-for-profits. CME points out that Section 611 does not require local franchising authorities to provide PEG channels and claims that few operators make them available. CME further contends that most not-for-profits do not qualify for use of PEG channels.[131] CME asserts that a temporary set-aside would give not-for-profits additional time to organize and raise the funds needed to launch a new programming service.[132]

106. Other parties have also sought preferential rate and set-aside treatment under the leased access rules. For example, SUR states that per-event or per-channel pay programmers serving minority or educational needs, as defined in Section 612(i)(2) and (3), should receive a substantial discount on the maximum rate calculated for a general interest programmer such as HBO. The discount should, according to SUR, reflect the size of the potential minority or educational interest to be served.[133] SUR further argues that, when an operator is confronted with greater demand for leased access than it can accommodate, the operator should be required to allow first use for "diversity enhancing and Congressionally favored program offerings" which, according to SUR, include minority and educational programming.[134] In addition, Engle Broadcasting ("Engle"), licensee of a low power television ("LPTV") station, asks that preferential leased access rates be accorded to all LPTV stations. According to Engle, LPTVs are supported entirely by local advertisers (in other

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[130] Ex Parte Letter from Jeffrey Chester, Center for Media Education and Bradley Stillman, Consumer Federation of America, to Reed Hundt, Chairman, Federal Communications Commission (June 1, 1994).

[131] CME Petition at 12. CME provided a Study conducted by Professor Patricia Aufderheide, *Cable Television and the Public Interest*, 42 Journal of Communication 52 (1992). CME notes the Study's finding that in 1990, only 16.5% of systems had public access channels, 12.9% had educational access channels, and 10.7% had government access channels. (Study at p. 58, citing to Television and Cable Factbook, 1990, p. C-384). Ex Parte Letter from Jeff Chester and John Schwartz, Center for Media Education, to Bruce Romano et al., Federal Communications Commission (March 14, 1994).

[132] CME Petition at 12-13; Ex Parte Memorandum from John Schwartz and Jeff Chester, Center for Media Education, to Bruce Romano, et al., Federal Communications Commission (February 4, 1994).

[133] SUR Petition at 11.

[134] *Id.* at 14-15.

words, they do not receive any revenues from viewers or subscribers), which means that they cannot afford the rates required by the Commission's rules. Engle contends that the Commission should encourage LPTV carriage on leased access because, among other things, LPTVs generally provide local, community-oriented programming which serves the public interest.[135]

107. Cable operators object to these requests for preferential treatment. Bend, for example, contends that reduced leased access rates for some programmers are not essential to program diversity.[136] In opposition to CME's request, Bend claims that PEG channels serve as outlets for not-for-profit entities or other non-commercial programmers. Bend notes that Congress granted local franchising authorities discretion to decide whether cable system revenue or other resources should be used to promote PEG access. Bend further asserts that cable operators provide a variety of programming that caters to special needs and interests.[137]

108. Continental also objects to the preferential treatment requested by various programmers and points out that CME's request for lower rates and channel set-asides for not-for-profits is "largely a rehash of arguments previously considered and properly rejected by the Commission."[138] Continental stresses that what is at issue are the rates for leased access. According to Continental, educational entities have ample subsidized access both on cable systems (i.e., through must carry, PEG, Section 612(i)) and through other media outlets (i.e., ITFS). Continental claims that "minority programmers receive special preferences in broadcast licensing with PEG and the Section 612(i) minority provisions providing more than adequate subsidized minority outlets."[139] Thus, Continental insists, there is no basis for setting special lower rates for these, or any, programmers.[140]

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[135] Engle Reply at 8-12. Engle asserts that the Commission should apply one rate formula to LPTV leased access users and one to all other leased access programmers. Engle proposes generally that the non-LPTV leased access rate should be the product of the amount the cable subscriber pays for the BST multiplied by the percentage of audience share for similar channels in the same program category. Engle apparently contends that the LPTV rate should be calculated under a similar formula, except that LPTV stations should be considered to have the same viewer levels as local access channels on cable systems, which Engle estimates to be 0.1 percent. *Id.*

[136] Bend Opposition at 5.

[137] *Id.* at 5-6. Bend cites as an example the efforts of Colony Communications, which provides an entire local channel in Spanish on its Dade County, Florida system.

[138] Continental Opposition at 27, n.7.

[139] *Id.* at 29.

[140] *Id.*

109. CVI contends that there is no rationale or legal basis for the Commission to prescribe lower rates for special classes of programmers. CVI argues that Congress modified the leased access provision "to promote competition in the delivery of diverse sources of video programming," not to force cable operators to subsidize underfunded programmers.[141] With respect to CME's request for temporary set-aside capacity, CVI asserts that not only is a set-aside confiscatory, it is inconsistent with the framework of the legislation.[142] Similarly, Cox Cable Communications, Inc. ("Cox") states that it strongly opposes mandatory, separate, lower rates for not-for-profit organizations. Cox contends that operators should not be forced to give up their property (i.e., channel capacity) for less than a fair market return. Cox instead supports allowing operators, at their discretion, to negotiate more favorable rates for not-for-profit programmers.[143]

110. Time Warner claims that attempts to create additional categories of programming based on the nature of the speaker or content of its speech results in content-based regulation that cannot survive scrutiny under the First Amendment. Further, Time Warner argues that such categorization is inconsistent with the Congressional admonition that cable operators not exercise editorial discretion on leased access channels.[144] Time Warner claims that, contrary to CME's argument, most subscribers are served by systems offering PEG channels. Time Warner also claims that CME offers no evidence to support its claim that most non-profit programmers will not qualify to use public access channels.[145]

3. Discussion

111. In adopting the 1984 Cable Act, Congress contemplated that operators would be permitted to offer preferential leased access rates to not-for-profit entities. The House Committee stated that:

> [i]t is important to note, though, that [Section 612(f)] does contemplate permitting the cable operator to establish rates, terms, and conditions which are discriminatory. . . . [B]y establishing one rate for all leased access users, a price might be set which would render it impossible for certain classes of cable

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[141] CVI Opposition at 18-19.

[142] *Id.* at 19 (contrasting CME's proposal for a mandatory set-aside with the discretionary set-aside set forth by Congress for qualified minority and educational programmers).

[143] Ex Parte Letter from James A. Hatcher, Cox Cable Communications, to Patrick J. Donovan, Federal Communications Commission (May 17, 1994).

[144] Time Warner Opposition at 31-32.

[145] *Id.* at 35, n.102.

services, such as those offered by not-for-profit entities, to have any reasonable expectation of obtaining leased access to a cable system.[146]

Furthermore, one of the statutory purposes of the leased access provisions is "to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems."[147] Diversity might be hampered if, as CME argues, even the largest not-for-profit organizations cannot afford the maximum leased access rates allowed by the Commission's rules. The Commission is concerned that not-for-profit programmers are being excluded from leased access, but lacks sufficient evidence in the record to make a determination whether the goal of diversity is being achieved and, if it is not being achieved, whether one of the reasons is that rates are unaffordable for not-for-profit entities.

112. The Commission invites interested parties to demonstrate, with specific examples, whether current leased access programming sources are sufficiently diverse and whether preferential treatment for not-for-profit programmers would significantly affect the diversity of current programming sources. In order to determine the extent to which current rates may be restricting the diversity of programmers, the Commission requests commenters to provide precise data indicating whether or not rates charged to leased access programmers are affordable for not-for-profit entities. In other words, we solicit commenters to furnish examples that are specific and concrete. Commenters in support of preferential treatment for not-for-profit programmers should explain their position within the context of our previously stated belief that operators should not have to subsidize leased access programmers[148] and the statutory requirement that leased access use should not "adversely affect the operation, financial condition, or market development of the cable system."[149] Those commenters should also address the extent to which preferential treatment is necessary given that public access is already provided for under current PEG requirements.

113. If we conclude that some form of preferential treatment is appropriate, we seek comment on whether a lower maximum rate should apply to not-for-profit leased access programmers. For example, if a nominal rate should be set, we seek specific evidence demonstrating what rate should apply and why. Alternatively, if the proposed cost formula is adopted, we seek comment on whether operators should be required to exclude lost advertising revenues or lost commissions from maximum rates charged to not-for-profit leased access programmers. In addition, we solicit comment on whether not-for-profit leased access

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[146] 1984 House Report at 51.

[147] Communications Act, § 612(a), 47 U.S.C. § 532(a).

[148] *See* Section III.A.3.a.

[149] Communications Act, § 612(c)(1), 47 U.S.C. § 532(c)(1).

programmers should be entitled to preferential rates during any transition period that might be adopted for the cost formula.

114. Preferential rates, if adopted, would provide no relief if not-for-profit leased access programmers are denied access to a system because the operator has met its set-aside requirement. We seek comment on whether the statute would permit us to consider a set-aside requirement for not-for-profit programmers. If so, would the public interest be served by such a set-aside requirement and how should it be structured? For example, would a reservation of 25 percent of leased access capacity be appropriate? Should a set-aside requirement be temporary or permanent, and if temporary, what length of time would be appropriate? Furthermore, if the proposed cost formula were adopted, how would the need for a set-aside requirement be affected, given that the formula allows market rates to prevail when demand for leased access exceeds an operator's set-aside requirement? If a such a set-aside requirement were imposed, we would stipulate that until a not-for-profit leased access programmer demanded access to a not-for-profit set-aside channel, the operator must use the channel for for-profit leased access programming, unless no demand exists, in which case it may use it for its own programming.

115. We also seek comment on whether preferential treatment should be limited to not-for-profit programmers or whether certain types of for-profit programmers should also receive preferential treatment. We believe that there is insufficient evidence on the record for us to adopt the recommendations of SUR and Engle that LPTV stations and minority and educational programmers should receive preferential treatment, but we invite commenters to demonstrate with specific evidence why a preference for certain types of for-profit programmers may be appropriate. We also seek comment on whether a "not-for-profit programmer" should be defined as a programmer with Section 501(c)(3) tax-exempt status[150] or whether another classification should apply.

D. Tier and Channel Placement

1. Background

116. Congress did not mandate specific tier or channel location for leased access, as it did for PEG channels. Thus, in the *Rate Order*, the Commission declined to establish requirements for placing leased access on particular tiers or channels. Instead, we determined that these issues are best left in the first instance to negotiations between the parties.[151]

[150] Internal Revenue Code, 26 U.S.C. § 501(c)(3).

[151] *Rate Order*, 8 FCC Rcd at 5939, ¶¶ 498-500.

2. *Petitions*

117. CME urges the Commission to reconsider its decision not to establish terms regarding channel location and tier access. According to CME, the statute directs the Commission to "establish reasonable terms and conditions for such use [of leased access]," and one of the terms to be established is channel placement.[152] CME relies on the legislative history of the 1992 Cable Act, which states that the Commission "should ensure that these [leased access] programmers are carried on channel locations that most subscribers actually use."[153] Thus, CME argues that, in order to fulfill Congressional intent, the Commission should establish reasonable terms and conditions involving channel placement. ValueVision supports CME's position on tier and channel placement.[154] Videomaker also urges the Commission not to give operators discretion as to tier and channel location for leased access because the operator may place the programmer on a tier that very few subscribers receive, or at less desirable time slots. Videomaker asserts that placement of a lessee's programming is crucial to its success, and thus an uncooperative operator could effectively stifle the lessee's chances of success if the operator has the ability to control leased access tier and channel placement.[155] Cable operators, on the other hand, have not asked us to reconsider the initial determination that channel placement and tier access will be influenced by individual circumstances and are best resolved through the negotiation process in the first instance.

3. *Discussion*

118. The statutory commercial leased access provisions are intended to provide programmers with a "genuine outlet" for their programming. According to the legislative history of the 1992 amendments to Section 612, the Commission should ensure that programmers are carried on channel locations that "most subscribers actually use,"[156] a guideline that should be interpreted in light of the statutory provision that leased access use should not adversely affect the market development of a cable system.[157] We tentatively

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[152] CME Petition at 14, *citing* Communications Act, § 612 (a)(4)(A)(ii), 47 U.S.C. § 532 (a)(4)(A)(ii).

[153] CME Petition at 14-15, *citing* 1992 Senate Report at 79.

[154] ValueVision Opposition at n.5.

[155] Videomaker Opposition at 6.

[156] 1992 Senate Report at 79.

[157] Communications Act, § 612(c)(1), 47 U.S.C. § 532(c)(1).

conclude that, absent some compelling reason (such as technical considerations),[158] leased access programmers have the right to be placed on a tier, as opposed to being carried as a premium service. We believe that, if an operator were permitted to force leased access programming to be offered as a premium service, the programmer would not be assured access to most subscribers.

119. Our 1995 Competition Report states that a large percentage of subscribers (more than 90 percent) receive CPSTs.[159] We tentatively conclude that both the BST and the CPST with the highest subscriber penetration qualify as genuine outlets because "most subscribers actually use" them.[160] However, we seek comment on whether a CPST that does not boast the highest subscriber penetration could qualify as a genuine outlet, and under what circumstances. For example, should we interpret the term "most subscribers" as greater than 50 percent? In order to permit flexibility in the market development of an operator's cable system, we would allow the operator to decide whether it is appropriate for its particular system to carry the leased access channel on the BST or on a CPST that qualifies as a genuine outlet. An exception would apply for programming that the operator is required or permitted to scramble or trap out, such as channels that are primarily dedicated to sexually-oriented programming. To ease technical burdens, operators would be permitted to place such programming with other programming that is also scrambled or trapped out.

120. Our discussion of tier and channel placement in the *Rate Order* was intended to recognize that there are likely to be issues related to access control equipment which could affect a system's channel placements. The core requirement is that the operator place the leased access programming on the system. Depending on the current use of the channels the operator designates for leased access, retrapping might be required to provide full access or converter boxes might be required by subscribers without "cable ready" television sets. For example, a system providing a BST containing only mandated services (local must-carry signals and PEG access channels) and controlling subscriber access through a trapping system would have to change out the traps of all basic subscribers to afford them access to a new leased channel service. We propose to allow operators to consider these concerns when deciding whether to place leased access programming on either the BST or a CPST that

[158] Given the technology of cable systems generally in use, any signal that is placed on the cable at the system's headend will appear at the back of the television sets of all subscribers automatically. Indeed, the segregated tiers, pay-per-channel, and pay-per-view services that cable systems provide generally involve trapping, interdiction, or scrambling equipment to withhold service from individuals who are unwilling to pay for it. Thus, at the outset there should be no impediment to a commercial leased access programmer delivering service to all subscribers.

[159] *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, CS Docket No. 96-61, 61 Fed. Reg. 1932 (1996).

[160] 1992 Senate Report at 79.

qualifies as a genuine outlet. However, as stated above, it would be the operator's prerogative to place programming that is required or permitted to be scrambled or trapped out with other programming that is scrambled or trapped out.

E. Obligation to Open New Channels and Bump Existing Non-Leased Access Services

1. Background

121. In the *Rate Order,* we did not specify the extent to which cable operators are required to remove current non-leased access programming to make capacity available for leased access programming when the operator does not have unused capacity available to otherwise accommodate the request. We also did not address whether operators are required to open up a second set-aside channel that is dark (i.e., activated but without programming) in order to accommodate a leased access request when the first set-aside channel is not fully leased.

122. In *TV-24 Sarasota, Inc. v. Comcast*, the programmer argued that the cable operator should be required to open up an additional leased access channel, even though the first channel set-aside was not fully leased, in order to accommodate its request for a particular two-hour time slot twice a week.[161] The programmer complained that the operator should not be able to prevent it from obtaining a specific time of day slot that may already be taken on the first channel. The programmer's argument was rejected because the operator could reasonably accommodate the programmer's request by providing comparable time slots on the existing leased access channel.[162]

2. Petitions

123. In its petition, which was filed before the release of the *TV-24 Sarasota, Inc. v. Comcast* decision, Continental asked us to clarify on reconsideration that cable operators are not required to make a specific time available to a lessee if it would require the use of a second designated leased access channel, so long as time remains on the first designated channel already used for commercial leasing.[163]

3. Discussion

124. Cable operators that have not fulfilled their statutory requirements for leased access generally should be required to accommodate requests for leased access time.

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[161] 10 FCC Rcd 3512, 3514-3515 (Cable Serv. Bur. 1994).

[162] *Id.* at 3518.

[163] Continental Petition at 22.

However, we recognize that there may be circumstances in which substantially greater harm to the subscribers, the operator, and the non-leased access programmer may result if the leased access request is accommodated than would result for the leased access programmer if the leased access request is not accommodated. As was the case in *TV-24 Sarasota, Inc. v. Comcast*, a programmer may request a specific leased access time slot for only a few hours per week at a time which is currently being used by another leased access programmer. We seek comment on whether there is any compelling reason to depart from this precedent and require the operator to open up another leased access channel, thereby dislocating a full-time programmer, even if the operator can otherwise reasonably accommodate the leased access request in a comparable time slot.[164] As stated in *TV-24 Sarasota, Inc. v. Comcast*, "we believe that a possible disruption of existing programming in order to accommodate only a few hours of leased access demand, where adequate and comparable capacity is available on an existing leased access channel, will not advance the goal of assuring 'that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems.'"[165] However, we solicit comment on whether it is sufficient to require a "reasonable accommodation in a comparable time slot" or whether the standard should be further defined, such as a comparable time slot where the audience is of similar size and profile. We also seek comment on whether the operator should be required to remove an existing full-channel programmer if the leased access programmer agrees to a minimum time increment. We tentatively conclude that the guarantee of a minimum time increment of eight hours within a 24-hour period would be a reasonable pre-condition for requiring an operator to open up an additional channel for leased access.

125. We also tentatively conclude that operators should not be required to open up an additional channel even if it is dark, provided that the programmer can otherwise be reasonably accommodated or does not agree to a minimum time increment of eight hours within a 24-hour period. We believe that essentially the same opportunity costs are involved regardless of whether the operator is forced to dislocate existing programming or is precluded from carrying new programming.

126. We remind operators of their obligation to negotiate with programmers in good faith and in a timely manner to accommodate reasonable leased access requests. The goals of promoting diversity of programming sources consistent with the growth and development of cable systems, while also minimizing the amount of program disruption to subscribers, will be considered in evaluating the reasonableness of an operator's accommodation of a leased access request.

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[164] *See TV-24 Sarasota, Inc. v. Comcast,* 10 FCC Rcd at 3518.

[165] *Id., citing* 47 U.S.C. § 532(a).